

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
) 4:04CR3151-3
 Plaintiff,)
)
 v.)
)
 JOSE DELIRA, a/k/a Jose De Lira,) **MEMORANDUM**
) **AND ORDER**
)
 Defendant.)

The defendant has filed a motion (filing 145) seeking a modification of his sentence based upon a change in the criminal history Guidelines represented by Amendment 709. *See* Amendment 709, United States Sentencing Commission Manual, Supplement to Appendix C, at pp. 235-41 (Effective November 1, 2007). As the government notes, however, the amendment is not retroactive and the defendant is not entitled to any relief. (Filing 147 (discussing U.S.S.G. § 1B1.10 and Supplement to Guidelines Manual (March 3, 2008).)

To be specific, Amendment 709 was not listed as one of the amendments made retroactive by the Sentencing Commission. *See* Supplement to Guidelines Manual (March 3, 2008) at pp. 52, 56. As a result, 18 U.S.C. § 3582(c)(2) does not authorize retroactive application of Amendment 709 for purposes of reducing a sentence imposed prior to the effective date of the amendment. Since the defendant's sentence was imposed in 2005 (filing 87), and Amendment 709 became effective in 2007 and has not been made retroactive, the defendant is not entitled to any relief.

I also note that the Clerk wrongly docketed the defendant's motion as a "Motion to reduce sentence pursuant to crack cocaine Amendment 706 as to defendant Jose Delira." (Text accompanying filing 145.) The Clerk then entered a text order appointing the Federal Public Defender pursuant to General Order No.

2008-02. Both of these actions were erroneous since the defendant's motion does not seek relief under the "crack" amendments. Therefore,

IT IS ORDERED that:

1. The "motion of modification of an imposed term of imprisonment" (filing 145), treated as a motion made under 18 U.S.C. § 3582(c)(2) seeking retroactive application of Amendment 709, is denied.
2. The order (filing 146) appointing the Federal Public Defender is withdrawn and held for naught.
3. The Clerk shall correct the docket text at filing 145 in accordance with this memorandum and order.
4. The Clerk shall provide a copy of this memorandum and order to the defendant, to the prosecutor and to the Federal Public Defender.

DATED this 11th day of March, 2008.

BY THE COURT:

s/Richard G. Kopf
United States District Judge